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Adversarial Counsel in an Inquisitorial System

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Adversarial Counsel in an Inquisitorial System

Cover Page Footnote

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Adversarial Counsel in an Inquisitorial System

Richard E. Myers†

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I. Introduction

In criminal procedure, as in all law, context matters immensely. The value of a particular mechanism can only be truly understood within the context of the entire system in which it operates.¹ That is why one should be incredibly cautious about

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¹ For more comprehensive studies of the context in which these rights operate, see *SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION* (Ed Cape et al. eds., Intersentia Antwerpen-Oxford, 2007) [hereinafter *SUSPECTS IN EUROPE*] and *EFFECTIVE CRIMINAL DEFENCE RIGHTS IN EUROPE* (Ed Cape et al. eds., 2010) [hereinafter *EFFECTIVE CRIMINAL DEFENCE*].

making predictions from thousands of miles and an Atlantic Ocean away. Nevertheless, the extra-national commitment to the right to counsel, under the precedents established by the European Court of Human Rights (hereinafter ECtHR), has helped set the European nations that are parties to the Convention on the path to an increasingly adversarial system of criminal justice. The right to trial contemplated by Article Six² is increasingly interpreted as an adversarial trial with adversarial counsel.³ If that is true, then I predict that Europe's precedent will evolve over time toward a more adversarial baseline and proceedings that permit adversarial counsel to litigate various aspects of criminal cases will be mandated.

Moreover, I predict that the ECtHR will encounter the same set of institutional limitations that the U.S. Supreme Court has in enforcing the right to counsel.⁴ First, courts are better at defining and enforcing negative rights than positive rights.⁵ Second, Appellate Courts are better at enforcing process than accuracy, so they tend to impose more process as their concerns about accuracy rise. And third, appellate courts have no money to spend,⁶ so it follows that they cannot get too far in front of the population enforcing their decisions, especially when there may be core concerns about legitimacy.

If these institutional limitations do in fact exist, then in

² Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14, and Protocols to Said Convention, art. 6 (3)(c), Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone charged with a criminal offence has the following minimum rights: . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require") [hereinafter European Convention on Human Rights].

³ See EFFECTIVE CRIMINAL DEFENCE, *supra* note 1, at 23-24.

⁴ For an extended comparative discussion of the operation of the U.S. Supreme Court and the ECtHR, see Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 307 (2002).

⁵ This is, in part, because determining a "negative obligation concerns the question whether the applicant is deprived of an existing right or denied a right which he has not yet enjoyed," whereas defining a positive obligation requires "the state 'to cross a new threshold of tolerance.'" *Id.* at 320.

⁶ See Bruce Moyer, *Washington Watch: Budget Cut Could Hurt the Federal Courts*, THE FEDERAL LAWYER, May 2011, at 8, available at <http://www.fedbar.org/Advocacy/washington-watch/May-2011.aspx>.

practice, future ECtHR litigation addressing the commitment to counsel who can meaningfully contest evidence will mirror, especially to Americans, the litigation in the U.S. Supreme Court over the last fifty years that established the contours of the right to counsel in the U.S. federal system. In implementing its judgments, the ECtHR faces additional limitations imposed by the concept of the “margin of appreciation.”⁷ For the right to counsel, the limitations may be greatest in those settings where there is a commitment to an inquisitorial system.⁸

If the U.S. experience can serve as any guide, it is just as likely that an increase in adversarialness will negatively affect the perception of defense counsel as it will improve it.⁹ If that risk is realized, then the danger is a race to the bottom: the government will only meet the minimum requirements and the public will spend only as much as it must but not more, especially in trying economic times.

II. Differing Views on the Role and Value of Counsel

Those raised and trained in the United States are taught to prize the adversarial system as the one most likely to produce just results.¹⁰ In fact, it is so much an article of faith that I have found questioning it quickly leads to lost tempers in some quarters. The adversarial nature of the American criminal justice system and the well-trained and active defense counsel operating within that

⁷ “Margin of appreciation” is the term used to describe the respect that the ECtHR accords the widely varying choices for structuring justice systems that exist in the European States. See Kleijkamp, *supra* note 4, at 325 (“[T]he doctrine of the margin of appreciation permits neither total independence nor absolute sovereignty, but provides the Member States with a certain latitude in enacting their own criteria and introduces a factor of differentiation and even of relativism within the Convention.”).

⁸ In the United States, the commitment to an adversarial system of criminal justice is presupposed; this article argues that anything short of an adversarial system will prove to be successful only in theory and not in practice. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 43-44 (5th ed. 2009) (discussing the adversarial system in the United States).

⁹ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE*, 80 (2001).

¹⁰ See *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

system, serve two overlapping roles in society. The first is the role of quality factfinder.¹¹ The contest between opposing parties is supposed to aid all in seeking the accurate determination of particular cases, both by accurately identifying and convicting those who did commit crimes and by identifying and releasing or acquitting those who did not.¹² The second role for adversarial counsel is the institutional role of acting as an independent check on legislative and executive power.¹³ Thus, well-trained counsel can speak out against injustice and highlight the unfairness that can arise when the state applies a sanction to an individual, even in a system that is operating within the rules that it has set for itself.

Some of the procedures adopted in the American system are well-suited to the first, accuracy-based goal, but other procedures undermine it in support of the second goal. In other words, some of our adversarial methods are "truthfinding," but others are clearly "truth-deflecting."¹⁴ For example, aspects such as the attorney-client privilege, the exclusionary rule, and an adversarial ethical system for defense lawyers (who must contest evidence that harms their client regardless of its accuracy), systematically benefit guilty defendants, often at the expense of innocent defendants, because they obscure the truth.¹⁵ Other accuracy-reducing aspects, such as requiring proof beyond a reasonable doubt, can benefit both the innocent and the guilty defendant.¹⁶ Society gains because of the innocence bias, in the form of fewer improper convictions, but pays the price when guilty defendants are returned to the streets.¹⁷ It follows that the more the public recognizes defense counsel's role as a check on power, the more suspicious it will become suspicious of defense counsel's values.

The inquisitorial model, because it relies on trained judges committed to determining the truth, is in theory less susceptible to

¹¹ See LAFAVE ET AL., *supra* note 8, at 42-43.

¹² See *id.* at 42.

¹³ See KAGAN, *supra* note 9, at 15, (arguing that "American adversarial legalism" is the result of the tension between a "political culture" and a "set of governmental structures that reflect mistrust of concentrated power").

¹⁴ For a more detailed look at this effect, see LAFAVE ET AL., *supra* note 8, at 42-43.

¹⁵ See *id.*

¹⁶ See *id.* at 46.

¹⁷ See *id.* at 47.

appeals to passion and the obfuscatory practices of counsel, either for the prosecution or the defense.¹⁸

III. Basic Right to Counsel

A. *Due Process in the U.S. Federal System*

The right to counsel in the United States is mandated by judicial construction of both the Sixth Amendment to the Constitution of the United States, which guarantees the right to counsel in all federal criminal cases,¹⁹ and the Due Process Clause of the Fourteenth Amendment,²⁰ which the courts have read to incorporate the right to counsel against the several states within the federal system.²¹ Specifically, the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic].”²² The Fourteenth Amendment further states, “nor shall any state deprive any person of life, liberty, or property, without due process of law.”²³ Over the years, the Fourteenth Amendment’s limitation on states’ actions has been read to incorporate the Sixth Amendment’s guarantee, which had initially applied only to the federal government.²⁴ The right to counsel, as it now stands, means that the states are subject to the oversight of the federal government, and the Supreme Court may reverse state court convictions if it determines that they were arrived at in violation of the Federal Constitution.²⁵

B. *U.S. Law – Gideon to Argersinger to Shelton*

1. *The Basic Right to Counsel in a Criminal Case*

In the United States, the Sixth Amendment’s guarantee of

¹⁸ See SUSPECTS IN EUROPE, *supra* note 1, at 7-8.

¹⁹ U.S. CONST. amend. VI.

²⁰ U.S. CONST. amend. XIV, § 1.

²¹ See LAFAYE ET AL., *supra* note 8, at 583-90 (discussing historical overview of case law behind this right.).

²² U.S. CONST. amend. VI.

²³ U.S. CONST. amend. XIV, § 1.

²⁴ See *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963).

²⁵ See LAFAYE ET AL., *supra* note 8, at 589-90 (providing a more in-depth look at the current law and the federal-state relationship).

assistance of counsel in criminal cases was originally interpreted to require the federal government to permit privately retained counsel to assist the defendant in cases in federal court.²⁶ Over time, in a line of cases starting with the landmark decision in *Gideon v. Wainwright*,²⁷ it has come to mean that the federal and state governments have an affirmative duty to provide effective, publicly compensated counsel to those who cannot afford it in any case where the defendant, upon conviction, could receive a sentence under which he might be incarcerated.²⁸

The right was not enforced against the states until 1932, when the Supreme Court first ruled that fundamental fairness, a component of due process under the Fourteenth Amendment of the Constitution, required counsel to be provided in a timely fashion to ignorant defendants facing the death penalty.²⁹ Over time, the Court chose to adopt the federal standard for provision of counsel wholesale, through a process known in American law as selective incorporation.³⁰ The federal right was fully incorporated against the states in 1963 in *Gideon v. Wainwright*, where the Court held that the several states had a duty to provide and pay for counsel for

²⁶ See *Betts v. Brady*, 316 U.S. 455, 466 (1942) (discussing the intention behind the Sixth Amendment's guarantee: "In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be 'allowed' counsel or should have a right 'to be heard by himself and his counsel', or that he might be heard by 'either or both', at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant."), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁷ See *Gideon*, 372 U.S. at 336-39 (denying the defendant counsel when facing charges for robbery and holding that the states must afford counsel to defendants charged with a felony).

²⁸ See *Alabama v. Shelton*, 535 U.S. 654, 654-55 (2002).

²⁹ See *LAFAYETTE ET AL.*, *supra* note 8, at 63; see also *Powell v. Alabama*, 287 U.S. 45, 47, 71-72 (1932) ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'") (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

³⁰ See *LAFAYETTE ET AL.*, *supra* note 8, at 69-70.

all indigent defendants charged with a felony.³¹ According to *Gideon*, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”³² Since *Gideon*, the rule has been expanded to include all cases in which the defendant serves actual time incarcerated as a result of a conviction. In *Argersinger v. Hamlin*,³³ the Court held that the state was required to provide counsel in any case in which the defendant might be given an active sentence.³⁴ This protection was extended further in *Alabama v. Shelton*,³⁵ where the defendant faced a suspended sentence of two years, which could have resulted in incarceration if activated.³⁶ The Court held that the state was required to provide counsel in such cases.³⁷

2. *Effectiveness: Strickland and Cronic*

It is important to remember why the Court thought that *Gideon* needed the assistance of counsel. In the United States, procedural complexity, waiver, and the fact that the ultimate factfinder for felonies is a lay jury all combine to make the assistance of a lawyer crucial if the system is to work as designed. Further, the notion of effective assistance of counsel is tied inextricably to the adversarial process.³⁸ The very definition of counsel is cast in adversarial terms; the Supreme Court has held that so long as counsel is sufficiently competent to ensure that the process was adversarial in nature, the constitutional standard of providing counsel has been met.³⁹ In *United States v. Cronic*⁴⁰ the Court

³¹ See *Gideon*, 372 U.S. at 344-45. “Indigent” is a term of art, and means that the defendant is unable to afford defense counsel. See BLACK’S LAW DICTIONARY 843 (9th ed. 2009).

³² *Gideon*, 372 U.S. at 344.

³³ 407 U.S. 25 (1972).

³⁴ See *id.* at 40.

³⁵ 535 U.S. 654 (2002).

³⁶ *Id.* at 672-74.

³⁷ *Id.*

³⁸ See *United States v. Cronic*, 466 U.S. 648, 655-57 (1984) (discussing the effective assistance of counsel standard).

³⁹ See *id.*

⁴⁰ 466 U.S. 648 (1984).

held:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversary testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.⁴¹

The test focuses on whether there has been an “actual breakdown of the adversarial process.”⁴²

A defendant could be assigned the attorney who most closely ekes past the minimal standards of competence in the jurisdiction, and he would meet the standard so long as he was allowed to contest the state and in fact did so. To show a constitutional violation based on ineffective assistance of counsel, two factors must be present: the attorney must be incompetent, and the incompetence must have affected the outcome of the case.⁴³ In *Strickland v. Washington*⁴⁴ the Court held: “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as a having produced a just result.”⁴⁵ There are a limited number of circumstances where the prejudicial effect required in the second prong will be presumed; the complete denial of counsel, the refusal of counsel to participate, and perhaps cases in which an unwaived conflict of interest so substantially interferes with the ability of counsel to act as an advocate that he would be deemed not to have participated.⁴⁶

In the years between *Gideon* and *Strickland*, the federal courts found a violation of the right to counsel in a limited number of instances where a defendant was systematically deprived of defense counsel,⁴⁷ but for the most part found ineffectiveness only

⁴¹ *Id.* at 656.

⁴² *Id.* at 657.

⁴³ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴⁴ *Id.*

⁴⁵ *Id.* at 692.

⁴⁶ See *id.* at 692-93 (holding that prejudice is presumed for conflicts of interest).

⁴⁷ See RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 169 (2d ed.

when the actions of counsel were so poor as to reduce the trial to a “mockery of justice.”⁴⁸ As commentators have noted, enforcing competence while maintaining an arm’s length relationship between the state and the defense is extremely difficult.⁴⁹

The mockery of justice standard seems inordinately low, but there are some justifications for it. The higher the level of scrutiny, the greater is the impetus on the part of the trial judge to intervene in derogation of basic premises of the adversary system. Moreover, intervention may occur at a point of what appears to be problematic action by counsel but in fact is an integral part of a trial strategy known only to counsel.⁵⁰

In *Strickland* the Court was careful to note that wide latitude must be given to defense counsel to represent the defendant and that judicial scrutiny must be “highly deferential.”⁵¹ According to the opinion:

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the wide variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.⁵²

Since *Strickland* there has been widespread criticism of the standard and of the Court’s hands-off attitude toward structural challenges to the provision of counsel.⁵³ Notwithstanding *Gideon*’s promise that there would be counsel and *Strickland*’s

2005) (discussing the difficulties with setting a standard for effective assistance).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Strickland*, 466 U.S. at 689.

⁵² *Id.* at 688-89.

⁵³ See Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835, 1849-52 (1994) (discussing structural issues with the ineffective assistance standard).

promise that counsel would be competent, the states have underfunded the defense to the point that lawyers labor under crippling workloads, triage is necessary in deciding which cases to aggressively defend, and vigorous representation is available only to those who can afford it and some lucky subset of indigent defendants.⁵⁴

C. Baseline Rights by Treaty—the European Convention on Human Rights and the European Court of Human Rights

The right to counsel in Europe is governed by Article 6(3)(c) of the European Convention on Human Rights (hereinafter the Convention).⁵⁵ Section (3)(c) of Article 6, which generally deals with the right to a fair trial, provides: “Everyone charged with a criminal offence [sic] has the [right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”⁵⁶

Under the terms of the Convention, judgments are legally binding on parties to the Convention.⁵⁷ Signatory parties to the Convention are obliged to adopt the Convention’s human rights principles into domestic law and establish effective remedies in domestic law for enforcing those rights.⁵⁸ In practice, countries have relied on a variety of methods for incorporating the Convention and the ECtHR’s judgments into domestic law, ranging from giving the Convention quasi-constitutional status to not incorporating the Convention into domestic law at all.⁵⁹ The United Kingdom has taken the additional step of statutorily requiring that the ECtHR’s judgments be taken into account by

⁵⁴ See *id.* at 12-13 (describing how states’ defense programs are underdeveloped).

⁵⁵ European Convention on Human Rights, *supra* note 2, art. 6(3)(c). ECtHR decisions, since they apply to a very wide range of criminal justice systems, also tend to provide fairly comprehensive discussions of domestic law regarding the issues being brought before the court. Therefore, the opinions can also be useful in finding domestic law in particular European states regarding right to counsel.

⁵⁶ *Id.*

⁵⁷ *Id.* art. 46(1).

⁵⁸ MARK WESTON JANIS, RICHARD S. KAY & ANTHONY BRADLEY, *EUROPEAN HUMAN RIGHTS LAW TEXT AND MATERIALS* 431-33 (3d ed. 2009).

⁵⁹ See *id.* at 448-50.

domestic tribunals.⁶⁰ The ECtHR's judgments are declaratory in nature and parties to the Convention are free to choose the means by which they comply with the judgment.⁶¹ If the ECtHR deems State-based remedies inadequate, it is also entitled to award money damages under the "just satisfaction" provision of Article 41.⁶² Under this provision, the ECtHR has awarded as much as thirty million dollars in damages to private litigants.⁶³

According to Professor Hodgson,

It is of course true that all EU Member States are members of the Council of Europe and have ratified the [Convention] However, the EU has acknowledged that compliance levels are far from uniform and enforcement mechanisms are weak Furthermore, compliance may be achieved in different ways through the "margin of appreciation," reflecting different criminal procedure traditions.⁶⁴

1. The Basic Right to Counsel in a Criminal Case— Benham, Quaranta, and Maxwell

Counsel must be provided at any proceeding that may have a significant impact on the right of the accused to present a defense in a criminal case.⁶⁵ In analyzing the threshold question of whether an action is criminal for the purposes of Article Six, the ECtHR must consider three criteria: "(1) the classification of the proceedings under national law, (2) the nature of the proceedings, and (3) the nature and degree of severity of the penalty."⁶⁶ The first criterion, national law classification, is a starting point. The second criterion is of greater importance and attempts to assess whether the proceeding is criminal or civil in nature, with actions

⁶⁰ KEIR STARMER, *EUROPEAN HUMAN RIGHTS LAW: THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 9 (1999).

⁶¹ CLARE OVEY & ROBIN WHITE, *JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 491 (4th ed. 2006).

⁶² *European Convention on Human Rights*, *supra* note 2, art. 41.

⁶³ OVEY & WHITE, *supra* note 61, at 497.

⁶⁴ Jacqueline, Hodgson, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*, 14 *NEW CRIM. L. REV.* 611, 618-49 (2011).

⁶⁵ *European Convention on Human Rights*, *supra* note 2, art. 6(3)(c).

⁶⁶ *Benham v. United Kingdom*, 1996-III *Eur. Ct. H.R.* 741, 756.

brought by a government authority having indicia of criminal proceedings.⁶⁷ With regard to the third criterion, the ECtHR has said that actions involving the potential deprivation of liberty are criminal.⁶⁸ In *Benham v. United Kingdom*⁶⁹ the ECtHR held that the detention of an individual in order to coerce him into paying taxes constituted a criminal proceeding, despite the fact that the proceedings at issue were civil under English common law.⁷⁰ The ECtHR said the fact that the defendant was at risk of three months of imprisonment and that the action was brought by a public authority supported treating the proceedings as criminal in nature for purposes of Article Six.⁷¹

In order for a defendant to qualify for free assistance of counsel, two conditions must be satisfied: (1) the defendant must lack "sufficient means to pay for legal assistance," and (2) provision of counsel must be in the "interests of justice."⁷² This first condition appears to generally be satisfied the defendant's declaration of insufficient means, and another criterion indicative of lack of sufficient means including appointment of free counsel in prior proceedings.⁷³ What satisfies the second condition is less clear. In *Quaranta v. Switzerland*⁷⁴ the court highlights two factors to be considered in determining whether provision of counsel is in the interests of justice: (1) the seriousness of the offense and (2) the complexity of the case.⁷⁵ With regard to the first factor, it appears that the potential for deprivation of liberty is always indicative of a sufficiently serious offense to warrant provision of counsel.⁷⁶ Nevertheless, in the absence of risk of deprivation of liberty, the potential for large fines can also warrant

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 1996-III Eur. Ct. H.R. 741.

⁷⁰ *Id.* at 756

⁷¹ *Id.*

⁷² *Quaranta v. Switzerland*, 205 Eur. Ct. H.R. (ser. A) at 16 (1991).

⁷³ *Tsonev v. Bulgaria* (No. 2), App. No. 2376/03, Eur. Ct. H.R. ¶ 39 (2010), available at <http://www.echr.coe.int> (click "search HUDOC case law;" select "HUDOC database;" and type in application number).

⁷⁴ 205 Eur. Ct. H.R..

⁷⁵ *Id.* at 17.

⁷⁶ *Id.*

provision of free counsel.⁷⁷ The complexity of the proceedings is assessed from the perspective of both the court and the defendant.⁷⁸ For example, the *Quaranta* panel said that the fact that the proceedings involved the potential activation of a suspended sentence as well as the fact that the defendant was “a young adult of foreign origin from an underprivileged background” indicated that the interests of justice supported provision of free counsel.⁷⁹

While the Convention makes clear that defendants have a right to free assistance of counsel at trial, the ECtHR has also extended this right to cover certain appellate proceedings.⁸⁰ The ECtHR has said that whether a defendant is entitled to free provision of appellate counsel (provided the *Quaranta* criteria are satisfied) turns “upon the particular features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and the role of the appellate or cassation court therein.”⁸¹ As is the case with the interests of justice analysis, the seriousness and complexity of the case are key factors in determining whether a defendant has a right to appellate counsel.⁸² In particular, in *Maxwell v. United Kingdom*⁸³ the ECtHR held that “a case . . . involving a heavy penalty, where appellant was left to present his own defence [sic] unassisted before the highest instance of appeal, was not in conformity with the requirements of Article 6.”⁸⁴ In *Granger v. United Kingdom*,⁸⁵ the ECtHR stated that complex grounds of appeal weighed in favor of free provision of counsel.⁸⁶ In *Shulepov v. Russia*,⁸⁷ the

⁷⁷ See *Pham Hoang v. France*, 243 Eur. Ct. H.R. (ser. A) at 17.

⁷⁸ *Id.*

⁷⁹ *Quaranta*, App. No. 12744/87, ¶¶ 34 - 35.

⁸⁰ See *Shulepov v. Russia*, App. No. 15435/03, ¶ 19 Eur. Ct. H.R. (2008), available at <http://www.echr.coe.int> (click “search HUDOC case law;” select “HUDOC database;” and type in application number).

⁸¹ *Id.* ¶ 19.

⁸² *Id.* ¶ 32 (citing *Maxwell v. United Kingdom*, 300 Eur. Ct. H.R. (ser. A) at 97-98 (1994)).

⁸³ 300 Eur. Ct. H.R. (ser. A) at 87.

⁸⁴ *Id.* at 97-98.

⁸⁵ 174 Eur. Ct. H.R. (ser. A) (1990).

⁸⁶ *Id.* 18-19.

⁸⁷ App. No. 15435/03, Eur. Ct. H.R. (2008), available at <http://www.echr.coe.int>

ECtHR said that the failure to provide the defendant with counsel when the appellate court had the power to review legal as well as factual issues and the facts that the defendant had been convicted of aggravated assault and murder, sentenced to prison, and forced to appear before the appeals court via teleconference, violated Article Six.⁸⁸

2. *Effectiveness-Artico*

As is the case under the Sixth Amendment in the United States, the European Court has held that the right to free counsel also encompasses the right to have the “effective assistance” of counsel.⁸⁹ The effective assistance inquiry has two components: (1) the determination of whether the defendant was denied effective assistance of counsel, and (2) whether the State had adequate notice of this deficient assistance.⁹⁰ The rationale for the first prong is the “Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence [sic] in view of the prominent place held in a democratic society by the right to a fair trial”⁹¹ Effective assistance of counsel requires more than mere “nomination” of free counsel.⁹² In *Artico v. Italy*,⁹³ the Court held that Italy failed to provide the defendant with effective assistance of counsel when the defendant’s appointed counsel informed the defendant that he could not represent him because of other commitments.⁹⁴ In instances where it becomes apparent that the defendant’s counsel is ineffective, the state has a duty to remedy the situation by either compelling the appointed counsel to provide effective assistance or replacing the ineffective counsel.⁹⁵ Illness of counsel and insufficient time for

(click “search HUDOC case law;” select “HUDOC database;” and type in application number).

⁸⁸ *Id.* ¶¶ 8, 34-36.

⁸⁹ *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 15-16 (1980).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ 37 Eur. Ct. H.R. (ser. A).

⁹⁴ *Id.* 8.

⁹⁵ *Id.* 18.

counsel to prepare have also been held to violate Article Six.⁹⁶ Effective assistance of counsel also requires that, if counsel is insufficiently conversant in the defendant's native language, an interpreter be provided to ensure the defendant is informed of the nature of the proceedings.⁹⁷

With regard to the second prong of the effective assistance of counsel inquiry, the defendant must also show that the State was on notice that her counsel was ineffective.⁹⁸ The ECtHR has explained the rationale behind this requirement:

[A] State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes . . . It follows from the independence of the legal profession from the State that the conduct of the defence [sic] is essentially a matter between the defendant and his counsel . . . The competent national authorities are required under Article 6 § 3(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.⁹⁹

In *Kamasinski v. Austria*,¹⁰⁰ the ECtHR said that the State court's awareness of a number of pre-trial meetings between the appointed counsel and the defendant would not have put the State on notice that counsel was ineffective.¹⁰¹ Nevertheless, once the defendant's counsel asked to be replaced at trial, the State was on notice of the deficiency.¹⁰²

Unlike in the United States, however, a showing that the actions of counsel actually prejudiced the defendant is not

⁹⁶ See *Daud v. Portugal*, 1998-II Eur. Ct. H.R. 739, 750.

⁹⁷ See *Kamasinski v. Austria*, 168 Eur. Ct. H.R. (ser. A) at 35 (1989).

⁹⁸ See *id.* at 33-34.

⁹⁹ *Daud*, 1998-II Eur. Ct. H.R. at 749-50 (*Kamisinski*, 168 Eur. Ct. H.R. (ser. A) at 33).

¹⁰⁰ App. No. 9783/82, Eur. Conv. on H.R. (1989) available at <http://www.echr.coe.int> (click "search HUDOC case law;" select "HUDOC database;" and type in application number).

¹⁰¹ *Id.* at 34

¹⁰² *Id.* It is important to note that the Court ultimately found that, despite the notice, *Kamasinski's* counsel provided effective assistance at trial and thus the defendant was not entitled to relief. *Id.*

required. "There is nothing in Article 6, par. 3 (c) indicating that such proof is necessary; an interpretation that introduced this requirement into the paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice" ¹⁰³

IV. Enforcement of the Right

In the United States, state courts operate under a system of dual federalism.¹⁰⁴ The Supremacy Clause of the United States Constitution requires that states follow the judgments of the U.S. Supreme Court when the Supreme Court has determined that the Constitution has created rights enforceable against the states.¹⁰⁵ On a case-by-case basis, defendants can appeal their convictions and have their convictions reversed if they have not been accorded the rights they are due.¹⁰⁶ The several U.S. states are obliged to incorporate the minimal due process rights into their codes of procedure, and must ensure that defendants are afforded counsel.¹⁰⁷ The states have leeway to decide how to provide counsel.¹⁰⁸ They may use a public defender service, contract with private counsel, pay private counsel on a fee-for-service model, mandate a pro bono provision of service as a condition of membership with the bar, or use a combination of these options.¹⁰⁹ The states have generally been compliant with the duty to provide some form of counsel.¹¹⁰ How good that counsel has been or must be is discussed in greater detail below.

While the ECtHR does not have the same degree of enforcement regulation as the U.S. courts, it has been effective in

¹⁰³ *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 17-18 (1980).

¹⁰⁴ *See, e.g., Heath v. Alabama*, 474 U.S. 82, 394-96 (1985) (detailing the history of the dual sovereignty doctrine).

¹⁰⁵ U.S. CONST. art. VI, cl. 2.

¹⁰⁶ *See* FED. R. APP. P. 3 (describing the right of appeal from district court decisions).

¹⁰⁷ U.S. CONST. amend. XIV, § 1.

¹⁰⁸ *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

¹⁰⁹ *See Susan Herlofsky & Geoffrey Isaacman, Minnesota's Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 568-71 (2011) (describing the various state systems).

¹¹⁰ *See id.*

enforcing its judgments.¹¹¹ Nevertheless, as Professor Hodgson notes, it too, faces limitations because “ECtHR pretrial defense rights ... provide no remedy in the vast majority of cases—those that do not proceed to trial, those disposed of by alternative means, or those that are dealt with by a guilty plea More generally, [the Convention] Article 6 is expressed in broad terms. . . .”¹¹² In addition to using peer pressure and appeals to the need for European stability, two of the ECtHR’s most powerful tools in enforcing its judgments are the threat of expulsion from the Council of Europe and the perception of party states that are not members of European Union that having a good record with the ECtHR is a precondition to joining the European Union.¹¹³ The expulsion authority is officially enumerated in the Council of Europe’s Statutes, but it has never been exercised.¹¹⁴ There is some concern that as the ECtHR’s authority expands beyond the relatively homogenous group of Western European nations that originally ratified the Convention, the ECtHR may have greater difficulty in effectuating its judgments.¹¹⁵ There is also concern that as the ECtHR provides expanded protection of rights through case law and infringes more and more on the sovereignty of individual states, its enforcement ability may be weakened.¹¹⁶

With regard to the right to counsel covered in Article Six, there has been an effort to develop remedies beyond financial compensation.¹¹⁷ Following such efforts, most contracting states have created mechanisms in national law to reopen criminal

¹¹¹ See JANIS ET AL., *supra* note 58, at 7 (“[T]he nations adhering to the Convention have submitted to [the Court’s] decisions with a willingness that can only be called startling.”).

¹¹² See Hodgson, *supra* note 64, at 649.

¹¹³ See OVEY & WHITE, *supra* note 61, at 502-04.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 506.

¹¹⁶ See *id.* at 510-11 (noting that the ECtHR must “tread[] a delicate path between developing and enhancing the standards inherent in the Convention text, and respect for the choices which individual States must take in the face of specific situations”); see also Taru Spronken & Dorris de Vocht, *EU Policy to Guarantee Rights in Criminal Proceedings: “Step by Step,”* 9 (2011), 37 N.C. J. INT’L L. & COM. REG 436 (2011) (“[T]he Convention has been successful in setting general (minimum) standards but since it does not provide for clear guidelines on how to implement them, the practical and effective character of the Convention rights leaves much to be desired.”).

¹¹⁷ See OVEY & WHITE, *supra* note 61, at 497.

proceedings following findings of certain violations by the ECtHR.¹¹⁸ In some cases, the Convention has explicitly recommended retrial as an appropriate remedy for violations.¹¹⁹

The Court also considers that where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation.¹²⁰

A. *Adversarialness*

The pressure toward greater adversarialism under the Convention is clear from two recent cases decided by the ECtHR: *Salduz v. Turkey*¹²¹ and *Panovits v. Cyprus*.¹²² In both cases, the court identified the importance of custodial legal advice before and during police interrogation, and further set Europe down the path to Anglo-American adversarialism.¹²³

Commentators have been noting the gradual shift.¹²⁴

¹¹⁸ *Id.* at 498.

¹¹⁹ *Id.*

¹²⁰ See *Levinta v. Moldova*, 52 Eur. Ct. H.R. 40, 1129 (2008) (internal citations omitted) and *Popovici v. Moldova*, nos. 289/04 and 41194/04, Eur. Ct. H.R. ¶ 87 (2005), available at <http://www.echr.coe.int> (select “search HUDOC case law;” select “HUDOC Database;” and then type application number) (recommending retrial in a case where the government relied on evidence extracted from the defendants via torture) (citing *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, 210 (2005)).

¹²¹ 49 Eur. Ct. H.R. 19, 421 (2008). In *Salduz*, the Court held:

[I]n order for the right to a fair trial to remain sufficiently ‘practical and effective’ Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right The rights of the defence [sic] will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

Id. at 437 (internal citations omitted).

¹²² App. No. 4268/04, Eur. Ct. H.R. (2008), available at <http://www.echr.coe.int> (click “search HUDOC case law;” select “HUDOC database;” and type in application number).

¹²³ See Hodgson, *supra* note 64, at 57.

¹²⁴ EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Morty & J.R. Spencer eds.,

The right to an ‘adversarial’ trial, the right to have one’s arguments heard, and the principle of equality of arms suggest a certain type of relationship between the judge and the parties to the proceedings, as well as between the parties themselves: these relationships seem to point more toward an accusatorial system and away from the inquisitorial tradition, although the European Convention is careful not to impose an abstract model of trial.¹²⁵

Over the years, the ECtHR has decided a number of cases that seem to increase this commitment.¹²⁶ The core principle of “equality of arms” seems incredibly difficult to define, but is clearly a part of the case law.¹²⁷ The right to contest the evidence in the file, with early access to that file by counsel, also suggests an increasingly adversarial relationship.¹²⁸ Further, the right to private consultation with counsel who will be committed to advancing the defendant’s interests suggests an adversarial posture between the defendant and the state.¹²⁹

B. Positive versus Negative Rights.

Whether a court will be effective at enforcing and executing its judgments depends on the scope of its powers of redress. As a general rule, in systems of divided government, courts are far better at dealing with negative rights—finding a violation where the state violates a “thou shalt not” commandment—than they are at dealing with positive rights, where the state must provide a good or service.¹³⁰ Courts have no money to spend, and enforcing

2005).

¹²⁵ See *id.* at 548.

¹²⁶ See *Foucher v. France*, 25 Eur. Ct. H.R. 234, 235 ¶ 34 (1997) (explaining that the concept of “equality of arms” is one of multiple features of a fair trial); see also *Bulut v. Austria*, 24 Eur. Ct. H.R. 84, 103-04 (1996) (holding that “[e]ach party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent”).

¹²⁷ *Foucher*, 25 Eur. Ct. H.R. at 235 ¶ 34.

¹²⁸ See *id.*

¹²⁹ *Chase Manhattan Bank v. Turner & Newall*, 964 F.2d 159, 165 (2d Cir. 1992) (“The privilege rests on the belief that in an adversary system, a client’s full disclosure to an attorney is a necessary predicate to skillful advocacy and fully informed legal advice.”).

¹³⁰ See Kleijkamp, *supra* note 4, at 320.

unfunded mandates is notoriously difficult.¹³¹ Appellate courts in a multi-jurisdictional system lack the money to directly impose their views regarding the scope of effective assistance of counsel¹³² and have no authority to create implementing legislation. To ensure that effective counsel is provided, they must depend on the political branches that control the purse strings, and that are responsive to lay intuitions of justice and the usefulness of defense counsel, which may depart significantly from the judgments of jurists, or of the legal profession more generally.¹³³ Therefore, I not so fearlessly predict that the European evolution of the right to counsel will face the same principal limitation faced by the U.S. states: money and the political will to invest in adversarial defense counsel.¹³⁴ In the United States, aggressively adversarial defense counsel is viewed by the ordinary citizen in many cases not as an aid to just outcomes, but rather as an impediment. When choosing between hospitals, educational institutions, and public defenders, the defenders often fall to the back of the line. While it is possible that they will fare better in Europe despite resource constraints, the reasons for that are not immediately apparent from this side of the Atlantic. Structural limitations in both systems mean that the courts only have so much power. As Professor Hodgson has shown, the courts may have hit a limit in Europe that mirrors the limit hit in the United States, requiring proponents of the right to counsel to take their advocacy to a different forum.¹³⁵ These parallels indicate that there are lessons that practitioners in both systems might be able to learn from each other.

¹³¹ See Moyer, *supra* note 6, at 8.

¹³² Cf. *id.* (noting that budget cuts could cause the right of counsel to go unfunded).

¹³³ One question I think astute readers may be asking themselves is: Is there a guild concern? Do all these lawyers want more and better-funded lawyers because they and their fellow guild members will benefit from the increased number of jobs and the increased compensation, not because they are in fact necessary for justice to prevail?

¹³⁴ Two other papers in this symposium reinforce this conclusion in far greater detail. Professors Spronken and de Vocht, *supra* note 116, and Professor Hodgson, *supra* note 64, seem to suggest that the court has reached its limits, and are suggesting the the Council of Europe will have to become involved for the right to counsel to be expanded appropriately.

¹³⁵ See Hodgson, *supra* note 64, at 57.

V. Funding the Enterprise

Defense counsel is essential to an “effective adversarial system,” in U.S. terms, or its “equality of arms” counterpart in the European context. The amount of access to counsel that is required is a difficult concept to define, particularly in the abstract, and even more difficult to enforce. The U.S. remedies have been enforced via reversal of conviction and, due to the “case or controversy” limitation, on an *ad hoc* basis.¹³⁶ The various states have responded by changing their processes to match the Supreme Court’s holdings, although there have been notable ebbs and flows in the states’ willingness to comply. The ECtHR rules are enforced through a combination of monetary judgments and domestication by the national governments of the procedural changes recommended by the ECtHR.¹³⁷ Certain ECtHR opinions have included a very strong recommendation that reversal is the only effective enforcement mechanism in particular instances. Like the Supreme Court, the ECtHR operates under the limits of the cases brought before it, and even with a rising caseload, has a limited ability to police the States that it oversees.¹³⁸

As noted above, positive rights are notoriously difficult for courts to enforce because courts lack the power to spend money.¹³⁹ The standard narrative suggests that one of the few positive rights enforced by U.S. courts is the right to counsel in criminal cases. The courts have had some success in the United States, in part because there is a negative right behind the positive right—that is, the state may not incarcerate a criminal defendant unless it has provided counsel first.¹⁴⁰ Because the courts are entwined in the processing of criminal cases, they can ensure that defendants are not convicted by denying the prosecution access to the judicial process. And since the courts have the power to refuse to participate, they have more leverage as an institution than they do in almost all other positive rights situations. Moreover, in the United States, the courts retain the right to disqualify counsel from

¹³⁶ See, e.g., *Cornwell v. Bradshaw*, 559 F.3d 398, 409 (6th Cir. 2010) (denying ineffective counsel claims).

¹³⁷ See OVEY & WHITE, *supra* note 61, at 490.

¹³⁸ See *id.* at 520.

¹³⁹ See Kleijkamp, *supra* note 4, at 320.

¹⁴⁰ U.S. CONST. amend. VI.

appearing before them, meaning they have leverage over the legal profession.¹⁴¹ Even with that leverage, however, the courts have had very limited success in forcing spending.¹⁴²

The U.S. Supreme Court's commitment to adversarialness and the right to counsel exceeds the political commitment of the voters in the several states.¹⁴³ Therefore, the court's holdings, even in the United States's highly adversarial system, have only been marginally effective.¹⁴⁴ By any definition, the systems for providing access to counsel are still woefully underfunded.¹⁴⁵ A subcommittee of the American Bar Association held extensive hearings with multiple participants in the United States criminal justice system, culminating in a 2004 report.¹⁴⁶ According to their research,

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply [sic] to everyone accused of criminal conduct effectively does not

¹⁴¹ 7 Am. Jur. 2d *Attorneys at Law* § 20 (2007).

¹⁴² Cf. Moyer, *supra* note 6, at 8 (stating the financial difficulties faced by courts and public defense).

¹⁴³ See generally, A.B.A. COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE (2004) (showing that while the Supreme Court has shown a consistent commitment to ensuring the right to counsel for the indigent, local voters and governments have not followed suit in funding public defender programs).

¹⁴⁴ Donald Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37 N.C. J. INT'L L. & COM. REG. 349, 379 (2011). Professor Dripps suggests at least one reason why: "The Supreme Court's reach exceeds its grasp in the criminal procedure field. Although the Court holds final responsibility for declaring the meaning of the general language in the Bill of Rights, it lacks practical power to compel state compliance with constitutional rulings." *Id.* at 63.

¹⁴⁵ David A. Simon, *Equal Before the Law: Toward a Restoration of Gideon's Promise*, 43 Harv. C.R.-C.L. L. Rev. 581, 586 (2008).

¹⁴⁶ GIDEON'S BROKEN PROMISE, *supra* note 143, at 1.

exist in practice for countless people across the United States.¹⁴⁷

Defense attorneys often operate under crippling caseloads to the point where public defender services in multiple jurisdictions have filed suit to prevent the courts from assigning them additional cases.¹⁴⁸ For example, in a 2008 lawsuit, the Miami-Dade County public defender's office, a large system in Florida, reported that the average number of felony cases being handled by defense counsel in a given year had risen to nearly five hundred.¹⁴⁹ Many lawyers don't have time to have a meaningful discussion of the facts of the case with their client, even in felony cases, leading to what some have called "meet 'em and plead 'em" representation, where the lawyer negotiates a plea deal without ever having spoken to his client.¹⁵⁰ The courts have responded to defenders' complaints in different ways. Some have removed counsel from misdemeanor cases, acknowledging that this means that those defendants cannot be sentenced to incarceration.¹⁵¹ Others have ordered members of the local bar to serve as pro bono counsel.¹⁵² Still others have ordered the public defenders to "tighten their belts" and continue providing service.¹⁵³

One reason that may underlie the limited political commitment to paying for defense counsel is the widely held belief that adversarial counsel are sometimes an impediment to, not an instrument of, justice.¹⁵⁴ Polling data from the United States suggests that how the right is framed is an essential factor in

¹⁴⁷ See *id.* at iv.

¹⁴⁸ Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

¹⁴⁹ *Id.*

¹⁵⁰ See GIDEON'S BROKEN PROMISE, *supra* note 143, at 16.

¹⁵¹ See Eckholm, *supra* note 148, at A1.

¹⁵² See, e.g., *Standing Order Regarding Pro Bono Representation* (D. Conn. 2008), available at http://www.ctd.uscourts.gov/PDF%20Documents/pro_bono_standing_order.pdf.

¹⁵³ See Eckholm, *supra* note 148, at A1.

¹⁵⁴ See generally Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 CRIM. L. BULL. 965, 18 (2010) (stating that 49% of Louisianans believe giving public defenders more money will cause justice to suffer).

driving public support.¹⁵⁵ Support for defense counsel rises when people are told that counsel are for the purpose of ensuring that everyone has access to justice and ensuring that the innocent do not go to jail.¹⁵⁶ When the question is framed that way, people are willing to spend money to provide counsel.

Nonetheless, that is not always the view of the public, or, more importantly, the legislature. Some police, prosecutors, and many members of the public believe defense attorneys help the guilty evade justice more often than they help the innocent receive it, and those are potentially powerful constituencies. Adversarialness infects relationships between many defense attorneys and prosecutors, but perhaps more critically, it shatters any sense of trust between many criminal investigators and the defense bar. This lack of trust makes the investigators less likely to seek information regarding defense theories and distrustful of sharing information with defense counsel, believing that counsel will twist the truth to help her client.

VI. Conclusion

In some ways, the view that defense counsel will twist the truth has a kernel of truth behind it. The adversarial defense attorney has situational ethics—the attorney's first duty is to her client, not to society, or to truth, except in some attenuated sense that the adversarial system is more likely to lead to the truth coming out.¹⁵⁷ Because of the nature of the relationship that defense attorneys have with the truth, their capacity to serve as honest brokers is decreased, not increased. The innocent defendant would likely be better off in a world with attorneys obligated to tell and reveal the truth in all cases. Nevertheless, because of other commitments like limited government, we buy additional protection for the guilty at the cost of the innocent.

¹⁵⁵ See, e.g., *id.* at 1-3.

¹⁵⁶ Cf. *id.* at 3 (stating that after giving such information to voters, they were more likely to support higher levels of funding).

¹⁵⁷ Monroe Freedman famously argued that a criminal defense attorney has a duty to obfuscate the truth. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966). Anecdotally, some defense attorneys do a far better job of retaining their personal credibility with the other participants in the system than do others. Some agencies, because of their known policies, actively undercut their ability to act as honest brokers.

Whether or not those criticisms are true, enough people believe them which has led to an underfunded defense bar in the United States.

Enforcing the right to counsel comes with additional hurdles beyond financing because monitoring the nature and quality of the client-counsel relationship in criminal cases is extremely difficult.¹⁵⁸ In criminal cases, the defendant and his or her counsel have an interest in keeping the state at arm's length for the duration of the relationship. Because a court cannot simultaneously monitor the quality of counsel's decisions and maintain an arm's length relationship, it must either time-shift¹⁵⁹ or outsource the monitoring. While much of the scholarship considering this question suggests that the United States has much to learn from the European States,¹⁶⁰ this article suggests the opposite is also true: the U.S. experience with judicial enforcement of the right to counsel in a multijurisdictional environment may have something to offer European scholars as well. A critically underfunded commitment to adversarialness is sure to be less effective than a well-funded inquisitorial system. These risks, and the U.S. experience with them, suggest that the ECtHR is right to proceed slowly in its judgments, particularly in light of the margin of appreciation.

¹⁵⁸ See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 264 (1997).

¹⁵⁹ Doing this monitoring during the trial has led to what is called the "mirror test." That is, if you can hold a mirror up to counsel's face and it fogs up, proving that he is still breathing, he qualifies as competent counsel. Doing much more raises serious questions about maintaining an arm's length and adversarial relationship, while still giving due deference to the client's independent interests and counsel's exercise of independent judgment. Ex post determinations regarding the competence of defense counsel are difficult, but may be better than real-time management since in an adversarial system, such a premium is placed on maintaining the arm's length relationship between the state on the one hand, and the defendant and counsel on the other.

¹⁶⁰ See, e.g., SUSPECTS IN EUROPE, *supra* note 1; EFFECTIVE CRIMINAL DEFENSE RIGHTS IN EUROPE, *supra* note 1.